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# A JEREMIAD.<sup>7</sup>

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AN ADDRESS DELIVERED BEFORE THE

KANSAS STATE BAR ASSOCIATION.

WEDNESDAY, JANUARY 15, 1896.]

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BY MR. A. L. WILLIAMS.

OF THE TOPEKA BAR.

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*“An error is not the better for being common, nor truth the worse for having been neglected; and if it were put to the vote anywhere in the world, I doubt, as things are managed, whether truth would have the majority, at least while the authority of men, and not the examination of things, must be the measure.”—LOCKE.*

## == A Jeremiad ==

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GENTLEMEN: All men hate those who prophesy evil. The visionaries who go around seeing only the end of the world in all things, and finding in the ordinary occurrences of life evidences in support of their gloomy prognostications—“gloomy pessimists,” to make use of the exuberant expression of one of our Topeka editors—are generally looked upon as the pests of society, and their presence shunned by all sunny-tempered people.

Noah, pottering away at his ark and explaining to his fellows the oncoming of the flood which should destroy the world; Jeremiah, pouring forth his lamentations over the new evils about to fall upon his beloved Jerusalem; Isaiah, pumping his lungs to their full capacity in his effort to outdo his rival prophets; Hosea, in more temperate language doing his share of wailing; Daniel, recalling to Nebuchadnezzar

his dreams and reading the sad interpretation thereof, were undoubtedly unpopular in their day, and were both jeered and gayed by the people around them. And yet it has sometimes seemed to me that the fellows who jeered Noah, and excited the irrepressible mirth of the loafers by asserting that it was not going to be much of a shower anyhow, were not of necessity wiser than old Noah, and certainly, though they may have laughed last, did not laugh best. And so, when the evils came upon Jerusalem which Jeremiah and Isaiah and their friends had foretold, it may possibly have occurred to some of the survivors who fled from Jerusalem to escape captivity and death, that it might have been well, possibly, to have received the words of the prophets, if not with respect, at least without derision.

Without being either a ship-builder or prophet, it is possible that what I am about to say may sound like a jeremiad, for it has occurred to me that it might be well to discuss somewhat the philosophy of our form of government and to call attention to the dangers which I sincerely believe beset it. Without resorting to Fourth of July oratory, it may be said as profoundly and philosophically true, that our form of government is the best the world has ever known, though the palm of best government

may fairly be disputed by England, from whom we borrowed most of our ideas of government; and, while contending that ours is best, I assert that its superiority consists in only one thing, which in the course of this paper I shall endeavor to point out. There is a difference, too often lost sight of, between the best form of government and a perfect form of government. There is, and in the nature of things there can be, no such thing as either a perfect government or a perfect form of government. Man, being imperfect, cannot create the perfect. Being finite, he cannot make the infinite. And all forms of government, from the very necessity of the case, have inherent within them the seeds of decay and death, precisely as the individual man does, and the best that may be hoped for in government is, that by care and attention, by patriotism and by knowledge, its existence may be prolonged. That all governments and all forms of government have their periods of youth, growth, maturity, old age, decay and death, is true, and, being ordained by unerring wisdom, is just.

Before pointing out what I conceive to be the strong and the weak points of our own government, it may not be amiss to make a hasty sketch of the evolution of government, as determined by the experience of the past; and, while it may

seem like dealing in the commonplace to mention things with which you are all familiar, it may yet have a certain degree of value if it provokes new inquiry upon the part of lawyers as to the origin and springs of human government.

The first government, in the very nature of things, was the family, and it was an unlimited monarchy, the father having absolute dominion in every respect over the lives of every member of his family, and would have had over their property but for the fact that they possessed none—it all being in him. This earliest form of monarchy was created by a law of nature, and not by circumstances. Love impelled the father to protect his offspring, and strength enabled him to secure their obedience. It frequently happened that during the lifetime of the father, many of his children reared families of their own, and the group thus created was known as the patriarchal, the father of the family being the patriarch and as absolute in his dominion over his sons' children as over the sons themselves. Even in this primitive government there arose a natural division which formed the basis of all succeeding governments, namely, the one, the few, and the many : and no system of government has ever been devised or can be devised which does not take notice of these three



classes. In the case I have mentioned, the patriarch, as head of the family, has constituted the one. He naturally preferred some one of his sons to the others, as is abundantly shown by the Bible account of the patriarchs, and the favoritism shown to one son would give to that son and to his children a certain degree of superiority over the other members of the family and thus constitute a crude aristocracy.

In the course of time the patriarchal family would become so large that it became a tribe, capable of defending itself against aggressions and making war upon its neighboring tribes, but continuing always under patriarchal rule, though the title was changed to that of chief. In the course of time, by intermarriages, several tribes became united under one head, when, of course, there could no longer be a patriarchal chief in the original acceptation of that term. And here we find the first rudiments of established government. Some one man, by reason of his greater wealth or strength, or numerical following, would become a leader. An intermediate class would be constituted in the same way, and become the aristocracy of the crude government; while the masses would constitute the common people. After a sufficient number of tribes had united to form what might be called a state, the division heretofore

pointed out as constituting the one. the few and the many, would become more pronounced, and enter directly into the constitution and form of any government to be created for the government of such state. There would thus be, as there always have been, the elements of the only three simple forms of good government which the world has ever known, namely, monarchy, aristocracy, and democracy. Each of these three forms of government has an evil form attendant upon it, and into which, sooner or later, every government the world has ever known has merged. The evil shadow following monarchy is despotism, following aristocracy is oligarchy, and following democracy is anarchy; and if the history of the past, supplemented by our knowledge of the weakness of human nature, be any criterion, we may safely assume that what has been will be, and that every government now existing upon the earth, if it continues long enough, will pass through all these forms. We may illustrate it by applying the experience of the past to the primitive state before outlined. After the state, as suggested, has passed beyond the patriarchal condition and no one man is the father of the community, the government will be a monarchy, obeying in the first instance the man best fitted to rule. Greatness is only a combination of op-

portunity with good common-sense and a particular capacity for the work most essential for the prosperity of the state. Greatness does not consist in a general superiority, but simply a superior knowledge of how to do a particular thing required, at a particular time and under particular circumstances. To illustrate: In primitive times, when the chief occupation of the tribes was fighting and looting each other, a weak and timid man with a knowledge of all the sciences, but with no means of making them useful, would be inferior to the man who possessed strength and courage, though densely ignorant of everything but the art of fighting. Such a man, by his skill in warfare, would be naturally selected as a king. The men who had most approved themselves in battle would be specially rewarded by him, and thus constitute the nucleus of an aristocracy. So long as this king lived and reigned he would probably govern wisely and well, and would so establish his power that upon his death it would descend to his oldest son, ordinarily, as being the strongest. This son might also rule wisely and well, and by so doing so strengthen his power that when he transmitted it to his son he would be an absolute monarch. Possessing the power transmitted by his father without his virtues, he would very soon become a tyrant.

Ultimately his rule would become so oppressive that there would be revolt, not against the form of government, but against the ruler, and this revolt would in every instance, as in every instance in the past it has been, be led by the aristocracy, for the simple reason that the violence of an absolute ruler in a monarchical government in which there is an aristocratic class, is always more felt by that class than by the common people. To preserve themselves from oppression and possible annihilation, they would ally themselves with the common people, and thus overturn the tyranny which grew out of monarchy. The name of king, or monarch, or any other single ruler being made odious, the government would be administered by the aristocracy, and as long as the original members of the aristocracy lived they would probably, admonished by the fate of the monarch they had overthrown, rule justly: but their successors, realizing their power without emulating the virtues of their fathers, would soon begin to wrangle among themselves for power, and some combination of the strongest families would assume supreme control and thus become an oligarchy. With the king deposed and the aristocracy practically destroyed, there would be in the state only the two parties—the oligarchy and the people. The oppression

of this form of government being too great to be borne, the common people, aided by the various members of the original aristocracy who had been crushed out by the oligarchy, would unite to overturn the government, and by being united would be, as the people always have been, successful. The new government thus created, being a government of the people, would be what is commonly called a democracy; though it is worth noting that there is no instance in history of such a thing as a pure democracy, nor is it possible to establish one, for the simple reason that in a pure democracy every individual has an absolute veto upon all the others, and it is simply another word for anarchy, into which I am sorry to say, all democracies of ancient times sooner or later degenerated. Being a democracy, or rather, being in a state of anarchy, by reason of the lack of a head and system of government, the victors would form themselves into a general assembly for the government of the people, and this general assembly would of course divide up into bitterly hostile factions, led by dangerous demagogues, which would proceed rapidly from intrigues to blows. There being no law, there would be no protection. Having no government, there would be no security, and it would simply be a disintegration

of society—the rule of the strong, in which of course the weakest would go to the wall. Out of this state of anarchy would arise some strong man, originally a demagogue, who, securing the largest following, would ultimately usurp the powers of government, and, having destroyed the last vestige of aristocracy, would rule supreme above the people.

These propositions are abundantly illustrated and demonstrated by the history of nearly every city of ancient Greece and of nearly every city of Italy during the middle ages; and in modern days we have seen the anarchy of Paris produce Napoleon, the tyrant of France.

It must not be supposed that during the transitions, such as I have briefly sketched, there were not thoughtful men attempting to devise some system of stable government for their distracted country. On the contrary, in every city, (and it should be said in passing that in ancient times the cities constituted governments of themselves,) there were learned men attempting to remedy the evils which constantly afflicted their country. The division of the people by a natural law into the one, the few and the many, has always been recognized by every writer of ancient or modern days, and an attempt has been made from very early times to contrive a system of checks and balances by which an

equilibrium could be established between the different powers. The nature of monarchy, aristocracy and democracy was as well known in the days of Herodotus, the father of history, as at the present day, and various efforts were made to devise some system of government which should preserve an equilibrium between the classes representing these various forms of government, and the bloody overthrow of many governments in the past has been due entirely to an ignorance of the system of checks and balances, ultimately adopted by England and taken and improved by us. It was early seen that a government which should have any freedom at all should be a representative one, in which the aristocracy and the people should have a share, but the evil was that the two bodies met in one assembly. It was believed, for instance, in Florence, when the people had practically secured control of the government, that no harm could come by allowing the aristocracy a minor representation, in an assembly composed of representatives of both classes. It proved then, as it had proved before and has proved since, and always will prove, a failure, and a dangerous one. Though the aristocracy were in the minority, they were enabled by their superior wealth, their following and their intelligence, to corrupt the commons with whom



they were associated, and to gradually re-assume and wield the real power of the government, though nominally it was still in control of the commons. The experiment of representation of classes in a common assembly has been tried in aristocratic republics as well as in democratic ones, and always with the same result. It was reserved for England to discover the true balance of powers, which was to separate the executive from the legislative—to divide the legislative into two bodies, each with a veto upon the other, and to make the judiciary separate from, but not independent of, the others. It was the glory of the United States that in addition to this system it not only made the judiciary independent of the legislative and the executive, but made it one of the checks upon both.

The convention which assembled in Philadelphia on the 14th of May, 1787, for the purpose of framing a constitution of government for the United States, contained more able men than were ever assembled before or since for consultation. There were men who were great soldiers in time of war and profound statesmen in time of peace. There were great lawyers, philosophers and statesmen present. There were very few members, indeed, who had not given more years to the study of the philosophy of govern-



ment than any man of the present day thinks it necessary to bestow upon any subject. They had read the history of all the republics, monarchies and democracies of ancient times, and had thoroughly advised themselves as to the strength and weakness of the various forms of government with which experiments had been made through the centuries. They were nearly all personally acquainted with John Adams, the framer of the constitution of Massachusetts, whose knowledge of those matters was phenomenal, and had availed themselves of that knowledge in preparing themselves for the task before them. While they had an excellent model before them in the unwritten constitution of England, there were many essential points which they had to determine for themselves, and for which there were no precedents in history.

They had, moreover, to devise at one time a complete and harmonious system of government—a task which no nation at that time had ever undertaken. The constitution of England, in other words its common law, was the growth and accumulation of centuries, the product of the customs, traditions and habits of the English people from the earliest time, and there was, therefore, no logical method in its arrangement. Our convention, therefore, while it availed itself of the wisdom of the English constitution,

was not indebted to it for the form in which they made our own. The makers of our constitution knew from abundance of experience, and particularly from the fact that England was the only stable government on earth which had endured for centuries, that the best form of government was one composed of the three simple forms of government known as monarchy, aristocracy, and democracy.

We all understand, and upon 4th of July proclaim the fact, that the framers of our constitution were not willing to establish a monarchy on this continent, but we do not understand so thoroughly as we ought to, that they held a pure democracy equally abhorrent. They had learned the great truth, which we have either forgotten or never knew, that the tyranny of the many is more to be dreaded than the tyranny of the one or the few. They knew, if we do not, that a mob is more dangerous and more bloodthirsty than a monarch. Neither were they willing to establish anything approaching an aristocratic form of government: their desire was to frame a constitution of government which should combine all that was best and reject all that was worst of the three forms of government before mentioned, and they performed that task in a way to entitle them to the eternal gratitude of their descendants. They knew that

no government could exist without a distinct head, as they had seen the Siamese-twin system of kingship tried in the consular governments of Rome, and knew the bloody and disastrous results following therefrom. They had observed the same evils resulting from the numerous experiments made in the smaller Italian cities in the middle centuries, and were thoroughly convinced that one responsible head of the government should be chosen. They knew that the legislative power should be vested in two distinct houses, each having an absolute veto on the other, and they therefore provided for a house of representatives and for senators. They knew also of the natural division of the people into the one, the few, and the many, and they therefore made of the senate an aristocratic body modeled after the House of Lords, and with as full an intention that it should be an aristocratic body as the English had when they created theirs. They had before them for their guidance the Massachusetts constitution of 1780, the work of John Adams, and availed themselves largely of that wonderful document, which contained within itself not only the correct rules of government, but profound philosophical dissertations upon the nature of government; and I cannot refrain from quoting a few expressions therefrom :

“The end of the institution, maintenance and administration of government is to secure the existence of a body-politic to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights and the blessings of life; and whenever these great objects are not obtained the people have a right to alter the governments and to take measures necessary for their safety, prosperity and happiness. The body-politic is formed by the voluntary association of individuals by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may at all times find his security in them. . . .

“No man, nor corporation nor association of men, have any other title to obtain advantages or particular and exclusive privileges distinct from those of the community, than what rises from the consideration of services rendered to the public; and this title being in nature neither hereditary nor transmissible to the children or descendants or relations by blood, the idea of a man born a magistrate, law-giver or judge is absurd and unnatural.”

That constitution also provided that the senators should have a freehold of at least 300 pounds, while a member of the lower house should be required to have a freehold of only 100 pounds. That he believed that the senate

should be an aristocratic body is evident from the following language from his work on constitutions, and the reasons therein given have stood the test of time. It is safe to say, too, that the members of the constitutional convention believed as he did when the Senate of the United States was created :

“The rich, the well born and the able, acquire an influence among the people, that will soon be too much for simple honesty and plain sense, in the house of representatives. The most illustrious of them must therefore be separate from the mass, and placed by themselves in a senate ; that is, to all honest and useful intents, an ostracism. A member of the senate, of immense wealth, the most respected birth, and transcendent abilities, has no influence in a nation in comparison with what he would have in a single representative assembly. When a senate exists, the most powerful man in the state may be safely admitted into the house of representatives, because the people have it in their power to remove him into the senate as soon as his influence becomes the great object of ambition ; and the richest and the most sagacious wish to merit an advancement to it by services to the public in the house. When he has obtained the object of his wishes, you may still hope for the benefits of his exertions without dreading his passions ; for the executive power being in other hands, he has lost much of his influence with the people, and can govern very few votes more than his own among the senators.”

Making the senators elective by the state legislature and fixing their term for six years, and so arranging the time of elections that the body

should practically be perpetual, was a very wise thing for another reason. The masses of any government are easily led away by the excitement of the moment, and, under the harangue of dangerous demagogues, are liable to commit great follies. Their immediate representatives in the lower house of Congress are naturally compelled to carry out any wild and visionary scheme proposed by them; but the senators, having six-years terms to serve, are in a position to more coolly and philosophically survey the situation and to determine whether or not the proposed legislation is wise, and if they believe it detrimental to the best interests of the country, will feel perfectly safe in vetoing it, firm in the belief that before their term expires the passions will have been allayed, and those who urged the wild measure will in their hearts thank them for having killed it. Indeed, a check upon hasty legislation, the result of passion, prejudice or disaster occasioned by panics, is essential to the stability of our government.

De Tocqueville, in his "Democracy in America," notices and praises this feature of our government. "Both emanate," he says, speaking of the house and the senate, "equally from the people, but do not represent the people exactly in the same manner; the office of the one is to follow the daily impressions, that of the other to



obey the habitual instincts and permanent inclinations of the community."

"To a people as little blinded by prejudice," says Madison, addressing the American people in defense of the senate, "or corrupted by flattery, as those whom I address, I shall not scruple to add, that such an institution may be sometimes necessary, as a defense to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers: so there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth, can regain their authority over the public mind. What bitter anguish would not the people of Athens have often escaped, if their government contained so provident a safeguard against the tyranny of their own passions! Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day, and statues on the next."

Pollock, in his Oxford Lectures, says:

"At no time has it been fitter for us to be put in mind that the effective power of law is not only the work but the test of a civilized

commonwealth, and that law, as a great English writer has said, is in its nature contrary to such forces and operations as are 'violent and casual.'"

The judiciary was modeled in the main after that of England, and I am of the opinion that the framers of our constitution did not themselves see how vast the difference would ultimately become between the two systems, by reason of the simple fact that ours was a written constitution, placing a check upon all the departments of government, while in England the only checks were upon the monarch; that is, the only written check which England had was Magna Charta, which was extorted by the barons, and simply placed a limit upon the power of the king; there being no limitation whatever upon the power of parliament, which was then and is now supreme. Consequently, in England all that the judges could do was to interpret the acts of parliament, but could not of course declare them in violation of a constitution which did not exist. The judges, therefore, while in one sense independent, were merely adjuncts to the king and the parliament, to decide causes between the subjects, take cognizance of criminal prosecutions, and act as advisers of the king and the parliament; and in a general way this was believed by the



framers of our constitution to be the extent of their duty here.

It is a curious fact that the power of the judicial department in this respect was less considered by the framers of our constitution than any other single question presented. That it was a distinct branch of the government, independent of both the executive and the legislative and a strong check upon both, was but dimly seen, and that it was the greatest of all the checks was not dreamed of. It is curious to notice that John Adams, looking back across the ages, could see plainly the mistakes of all previous governments in not establishing a system of checks and balances, and was yet apparently unable to see that the independent judiciary which he helped to establish would be one of the checks of our system. There is nothing anywhere in his writings to be found showing that he considered the judiciary as anything more than an auxiliary and assistant to the other powers of government; and yet the mere fact that we alone of all nations of the world had by a written constitution placed restrictions upon the power of the legislative as well as the executive, made it absolutely necessary that the courts of the United States should have the power to declare an act of the national legislature null and void, if in their judgment

such legislation was not warranted by the constitution. It seems strange now that the existence of this power could have been disputed, and stranger still that it was not clearly seen when our constitution was adopted. It must be apparent at a glance that our constitution would have no binding force as a check upon legislation unless there resided somewhere power to declare whether or not a given law was in violation of that constitution, and this power could only be exercised by the judiciary. To say that the legislature should itself sit in judgment upon its own power to legislate, would be to declare that the constitution had no force. And yet, the proposition that the courts had the power to declare an act of the legislature void because of its repugnance to the constitution, was received with great disfavor by many eminent men when the claim was first asserted. The first case in which it ever arose was that of *Commonwealth v. Caton*, in Virginia, in 1782, in the course of which Judge Withe emphatically asserted that power, saying:

“Nay, more, if the whole legislature—an event to be deprecated—should attempt to overleap the boundaries prescribed to them by the people, I, in administering the justice of the country, will meet the united powers at my seat in this tribunal, and, pointing to the constitution, will say to them, ‘Here is the limit to your authority; hither shall you go, but no farther.’”

The president of the court, Mr. Pendleton, more conservatively expressed himself in the following language, which conclusively shows that the claim was new at least to the country :

“But how far this court, in whom the judicial powers may in some sort be said to be concentrated, shall have the power to declare the nullity of a law passed in this form of the legislative power, without exercising the power of that branch, contrary to the plain terms of the constitution, is indeed a deep, important, and I may add tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas.”

The other judges were of the opinion that the court had the power claimed for it. A few other cases involving the same question were argued in the State courts immediately before and shortly after the adoption of the Federal Constitution ; and yet when the question of the power of the Supreme Court to declare an act of Congress void by reason of its repugnancy to the constitution first came before the court, in *Marbury v. Madison*, 1st Cranch, 137, it was treated with as much gravity as if it had never been raised before nor thought of. In fact, it had very rarely occurred to American lawyers, trained under the English system of jurisprudence, that the court could under any circumstances assume the right to set aside an act of

the legislature. It was in this case authoritatively settled that the Supreme Court had the power to declare an act of Congress void if in violation of the constitution, and the assertion was made and never since contradicted, that the constitution was an absolute limit upon legislative power, and that Congress did not possess the omnipotence of Parliament. The correctness of that opinion was so fully vindicated by the inflexible logic of Marshall, that it has never since been questioned, and I cannot refrain from quoting what he says:

“The question whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States, but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established to decide it. . . . The powers of the legislature are defined and limited; and that these limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the person on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it, or that the legislature may alter the constitution by an ordinary act. Between

those two alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. . . . If an act of the legislature repugnant to the constitution is void, does it, notwithstanding the invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law,—the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."

We have, then, as the three powers of the government, the executive, legislative, and judicial—each a complete check upon the other. So long as our constitution is maintained in its integrity and no change is made in the power of the three departments, so long will our liberties be secured. In theory, our system is as perfect as human ingenuity has ever devised, and it may well be doubted whether the future will ever be able to improve upon it.

Where, then, is the danger? Not from the executive, for his power is so circumscribed and limited that it is impossible for him to do violence to the constitution or endanger the liberties of the citizen. If he violates the constitution in a public matter, he is dealt with by a court of impeachment. If he, by an act of arbitrary power, attempts to injure the humblest citizen in the land, the courts afford swift and prompt protection. If he attempt by violence to subvert the constitution, the people would crush him.

The legislature is equally impotent for harm. It may pass bad laws, but these only work inconvenience and may be rectified by the people electing a new Congress to undo the evils of the law. If it attempt legislation repugnant to the constitution, the courts are a complete check upon it.



The judiciary, which has been so much denounced, is still more impotent for evil. It has neither the sword nor the purse; it has neither legislative nor executive functions. It can do nothing but declare what the law is, and then only when properly invoked by some one having the right to call for its interpretation. It can do nothing towards the enforcement of its own mandates; it cannot serve its own process; cannot enforce its own judgments; can neither imprison a convicted criminal, nor levy an execution upon the property of a judgment debtor. "It has," as Hamilton says, "neither force nor will, but merely judgment." Outside of and beyond the mere declaration of what the law is, it must look to the executive power of the nation to enforce its process or decrees, and this not only can be, but has been, withheld both by the executive and the legislative powers. The State of Georgia convicted a missionary for preaching to the Indians. The Supreme Court of the United States held the law under which the conviction was had, to be unconstitutional, and ordered the release of the prisoner. The authorities of Georgia refused obedience to the order, and the Governor remarked that he would sooner hang the prisoner than release him. An appeal was made to President Jackson for power to enforce the mandate of the court, which

he peremptorily refused, remarking, "John Marshall made this decision—now let him execute it." And this infamous sentiment, I have no doubt, was loudly applauded by men who did not understand how clearly it was the duty of the executive to enforce the mandates of the court.

The judiciary, then, having no power to legislate, having no control of the sword or the purse, having no power to execute its process or enforce its judgments, cannot be a serious danger. Where, then, is the danger, if neither of the three branches of the government nor the three combined menace our liberties? The danger in this case, as in all other democracies, is from the people themselves. In their struggle for more power and larger liberty, which simply means license, they aim a blow at imaginary evils and mortally wound themselves. The constitution is a chain of flawless steel to bind all the departments of government; it is a rope of sand to bind the people. The one and the few are the minority, and cannot change or impair the fundamental law of the land. The many are the makers of the law, and may at any time, under the influence of passion or prejudice, led by ignorant and vicious demagogues, in one day, subvert the only free government the world has ever known.



The tendency in this direction is very marked in the United States at present. In various shapes and under various guises the property of the few is being confiscated under the forms of law. The rights of corporations are ignored and the very name is made a synonym for infamy. We all know this fact, and we may soothe our conscience with the thought that the assault upon property is confined to corporations and will go no farther. It is a delusion, and a dangerous one, to believe so. The rights of the corporations and their property are assailed, not because they are inimical to the general interests, not because corporations have done anything to be outlawed, but simply because the rights in that property are held by the few and not distributed among the many. What is true to-day of one form of property will be true to-morrow of any other form of property held by less than a majority of the citizens.

Allison makes an exposition of this state of affairs too clear and too strong to be misunderstood, and too true to be denied. He says:

“As a natural consequence of this state of things there is, in opposition to the will or passions of the majority, no lasting security either for life or property in America in cases where the public mind is vehemently excited. Hitherto, indeed, no direct attack on property has been made, at least where it is vested in

land; for this simple reason, that the majority are themselves land-owners, and therefore any such system would be an attack upon their own interests. But the system of spoliating that species of property in which the majority do not participate, and for which they feel no interest, has already been carried to a most frightful extent. . . .

“This is nothing peculiar to America; in every country in the world the majority, under similar circumstances and similar political institutions, would do the same.”

Another evidence of the disposition of the people to destroy the government of their own creation is found in the increasing demand that the Senate of the United States be either abolished or the Senators be elected by the people, and for a shorter term than six years; and if the experience of the past is good for anything, it certainly proves that if the Senate were merged in the House and we were governed in our legislature by one assembly, this Government could not possibly survive long. As it is, the Senate is powerless. Its position is, as Adams says in a passage elsewhere quoted, an ostracism and an isolation; it can pass no bad law without corrupting the lower house, and if in its isolated position it could thus corrupt the lower house of Congress, how much more easily could its members do it if they were mingled with the lower house as brother

members! It can, then, at the most, only obstruct the passage of a good law, and it must be remembered that the liberties of the people are more endangered by the enactment of bad laws than by the failure to pass good ones. Moreover, no legislative body was ever yet constituted which for any length of time would refuse to pass a good law. Such a refusal would only work an inconvenience, and would be promptly rectified. The danger to all governments is in the passage of bad laws.

No reason has ever been assigned, and none of any weight can be assigned, why the Senate should not be elected as it is, and the Senators should not hold for six years. In fact, making the tenure of office six years is, as I have before pointed out, one of the most important provisions to protect against hasty and ill-considered legislation, that there is in our constitution.

Another great danger is in the assault made upon our judiciary. This branch of the government is being weakened by assaults from without, and by weakness from within, itself. It has grown to be a common charge on the part of a number of well-meaning people, and indorsed by some few lawyers, that the power of the courts is too great. This, if it means anything, can only mean that the courts should

not have power to declare a law unconstitutional. And yet, as I hope I have made manifest, without this power being vested in the court there would be no constitution. If some of those who complain of too great power in the judiciary were to be ordered imprisoned by an act of the legislature, they would promptly apply to the courts to release them, and it would seem to them perfectly appropriate that the court should release them, on the ground that the act of the legislature ordering their imprisonment was in violation of the constitution. And yet these same men, when the courts, applying the same rule, declare that some law which it is believed was intended to relieve the unfortunate creditors of our State, is unconstitutional and therefore void, inveigh bitterly against the same courts for oppressing the poor, and declare that they have too much power. The most serious blow at the judiciary, however, in my opinion, is too frequently given by the judges themselves, especially in an elective judiciary. With no disrespect toward an elective judiciary, it may safely be said that no bench filled by men elected by the people in any State in the Union, ever approached in dignity, power, clearness and courage, the Supreme Court of the United States: and the reason is not far to seek. It has its foundation

in human nature, and is shared by all of us. The men whose tenure is during good behavior understand that good behavior will continue them in their place. The men who hold by the votes of the constituent understand that the votes of the constituent which put them in can put them out, and they feel bound to regard the wishes of those who elect them, to some extent at least.

“That inflexible and uniform adherence to the rights of the constitution,” Hamilton says, “and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomsoever made, would in some way or other be fatal to their necessary independence. If the power of making them was committed either to the executive or legislative, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the constitution and the laws.”

John Marshall, sitting as a circuit judge, issued a subpœna *duces tecum* for the President of the United States, with the full knowledge that by so doing he incurred the enmity of the administration and both branches of Congress.

He knew that if he was doing his duty he could not be touched nor removed by an angry administration. But, great as he was, it is not unfair to his memory to suggest that if the men whom he angered by his action had had the power to remove him from his position by their vote, without assigning any reason therefor, he might have hesitated before taking the step.

If, then, any change is to be made in our judiciary, our judges should be appointed for life, and not elected for a short term, with the ever-recurring prospect before them of the necessity of appealing to an unstable people for re-election. It is in effect asking a constituent to indorse their action, and nothing could be more repugnant to the letter and the spirit of our constitution than an "indorsement" by the people of judicial action. The only question which any man or any body of men have a right to ask of a judge is, Has he decided correctly? Has he done his duty? And yet these are the very last questions which the electors ask when they sit in judgment on their judges, and if they had their way would soon make our government one of men and not of laws.

In many of the cities of Italy no citizen was allowed to be a judge, but one was imported from the outside, and this for the very wise purpose of securing absolute impartiality. A citi-



zen would know and be known to a great many of his fellows, and, however honestly inclined, would be in spite of himself prejudiced by his surroundings and his knowledge of the parties litigant; whereas, a judge brought from the outside and denied the right of citizenship would not have any bias, and would, moreover, understand that his continuance in office depended upon his fairness and uprightness. The substitute for that in this country should be an appointive judiciary.

If these assaults upon the Senate for being just what its creators intended it should be, and upon the judiciary for doing precisely what its creators intended it should do, continue in this country, it is not difficult to foretell the end. The danger menacing any people whose government is usurped by the mass is pointed out in language so much better than any I could use, by three of the most profound thinkers the world has ever produced, that I choose their language instead of my own, to express my views on the subject:

“An insatiable thirst of liberty destroys democracy. When a city is under a democracy and is thirsting after liberty, and happens to have bad cup-bearers and grows drunk with an unmixed draught of it, beyond what is necessary, it punishes even the governors, if they will not be entirely tame, and afford a deal of

liberty, accusing them as corrupted, and leaning towards oligarchy. Such as are obedient to magistrates are abused, as willing slaves and good for nothing. . . . And at length they [the people] *regard not the laws, written or unwritten*, that no one whatever, by any manner of means, may become their master. . . .

“Thus licentiousness destroys the democracy. Out of no other republic is tyranny constituted but out of democracy: and out of the most excessive liberty, the greatest and most savage slavery.” —PLATO.

“In all free states,” Swift says, “the evil to be avoided is tyranny: that is to say, the *summa imperii*, or unlimited power, solely in the hands of the one, the few, or the many. Though we cannot prolong the period of a commonwealth beyond the decree of heaven, or the date of its nature, any more than human life beyond the strength of the seminal virtue; yet we may manage a sickly constitution, and preserve a strong one; we may watch and prevent accidents; we may turn off a great blow from without, and purge away an ill humour that is lurking within; and render a state long lived, though not immortal.

“In Rome, from the time of Romulus to Julius Cæsar, the commons were growing by degrees into power, gaining ground upon the patricians, inch by inch, until at last they quite overturned the balance, leaving all doors open to popular and ambitious men, who destroyed the wisest republic, and enslaved the noblest people, that ever entered on the stage of the world.

“It is an error to think it an uncontrollable maxim, that power is always safer lodged in many hands than in one; for if these many hands be made up from one of those three di-



visions, it is plain, from the example produced, and easy to be paralleled in other ages and countries, that they are as capable of enslaving the nation, and of acting all manner of tyranny and oppression, as it is possible for a single person to be, though we should suppose their number not only to be four or five hundred, but three thousand. In order to preserve a balance in a mixed state, the limits of power deposited with each party, ought to be ascertained and generally known: the defect of this is the cause of those struggles in a state, about prerogative and liberty; about encroachments of the few upon the rights of the many, and of the many upon the privileges of the few; which ever did, and ever will, conclude in a tyranny; first either of the few or the many, but at last, infallibly, of a *single person*: for whichever of the three divisions in a state is upon the scramble for more power than its own, as one of the three generally is, (unless due care be taken by the other two); upon every new question that arises, they will be sure to decide in favour of themselves; they will make large demands, and scanty concessions, ever coming off considerable gainers;—thus at length the balance is broke, and tyranny let in, from which door of the three it matters not.

“The desires of men, are not only exorbitant, but endless: they grasp at all; and can form no scheme of perfect happiness with less. Ever since men have been formed into governments, the endeavors after universal monarchy have been bandied among them: the Athenians, the Spartans, the Thebians, and the Achaians, several times aimed at the universal dominion of Greece: the commonwealths of Carthage and Rome affected the universal empire of the

world: in like manner has absolute power been pursued, by the several powers in each particular state, wherein single persons have met with most success, though the endeavors of the few and the many have been frequent enough; yet being neither so uniform in their designs, nor so direct in their views, they neither could manage nor maintain the power they had got, but were deceived by the popular ambition of some single person: so that it will be always a wrong step in policy, for the nobles or commons to carry their endeavors after power so far as to overthrow the balance. With all respect for popular assemblies be it spoken, it is hard to recollect one folly, infirmity or vice, to which a single man is subject, and from which a body of commons, either collective or represented, can wholly be exempt; from whence it comes to pass, that in their results have sometimes been found the same spirit of cruelty and revenge, of malice and pride; the same blindness and obstinacy, and unsteadiness; the same ungovernable rage and anger; the same injustice, sophistry, and fraud, that ever lodged in the breast of any individual. When a child grows easy by being humoured, and a lover satisfied by small compliances without further pursuits, then expect popular assemblies to be content with small concessions. If there could one single example be brought from the whole compass of history, of any one popular assembly, who, after beginning to contend for power, ever sat down quietly with a certain share; or of one that ever knew, or proposed, or declared what share of power was their due, then might there be some hopes, that it was a matter to be adjusted by reasonings, conferences or debates. An usurp-

ing populace is its own dupe, a mere under-worker, and a purchaser in trust for some single tyrant, whose state and power they advance to their own ruin, with as blind an instinct, as those worms that die with weaving magnificent habits for beings of a superior order. The people are more dexterous at pulling down and setting up, than at preserving what is fixed; and they are not fonder of seizing more than their own, than they are of delivering it up again to the worst bidder, with their own into the bargain. Their earthly devotion is seldom paid to above one at a time, of their own creation, whose oar they pull with less murmuring and more skill, than when they share the leading, or even hold the helm."

Hamilton says :

"An unenlightened zeal for the energy and efficiency of government, will be stigmatized as the offspring of a temper fond of power, and hostile to the principles of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than the heart, will be represented as mere pretense and artifice. . . . The stale bait for popularity at the expense of public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of violent love, and that noble enthusiasm of liberty is too apt to be infected with a sort of narrow and illiberal distrust. On the other hand, it will be equally forgotten, that the vigor of government is essential to the security of liberty; that in the contemplation of a sound and well-informed judgment, their interests can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the

people, than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism, than the latter, and that of those men who overturn the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants."

When we look at the above extracts and reflect upon the fact that the first was written more than two thousand years ago, the second, two hundred years ago, and the last, in the latter part of the last century, by one of the framers of our constitution, and remember that they were all the results of historical study, and not the mere theories of visionary dreamers, we must be struck with their force, and be convinced that the dangers they point out undoubtedly lurk in our constitution as they have always lurked in other democratic governments of the world.

If Plato knew as the result of actual observation, two thousand years ago, that "out of no other republic is tyranny constituted but out of democracy"; if Swift, after a careful reading of all history, found that it was a false maxim "that power is always safer lodged in many hands than in one," and challenged history to produce an example of any "one folly, infirmity,

or vice, to which a single man is subject, and from which a body of commons, either collective or represented, can wholly be exempt"; and if Hamilton was convinced from history, "that of those men who had overturned the liberties of republics, the greatest number have begun their career by paying obsequious court to the people, commencing demagogues and ending tyrants," we must conclude that danger from demagoguery always attends upon democratic governments. It is a cancer inherent in the body-politic, and therefore incurable. If this be so, if it is a melancholy fact that all free governments are in constant danger from a source which sooner or later will cause their downfall, it behooves every man who loves his country and her institutions, to do what he can to retard the evil growth and make his government, as Swift says, "long lived, though not immortal."

This can be done if all members of the bar upon every occasion and before any audience, political, social, or professional, will tell the simple truth. To do this we need more political martyrs; men not only willing but glad to sacrifice all political ambitions, if by so doing they will promote the welfare of their country. If we would only learn that defeat is never dishonorable, though victory frequently is; if we

could stand firmly by Locke's declaration that "An error is not the better for being common, nor truth the worse for having been neglected," we could accomplish this. If, still further, we could absolutely strangle any political ambitions we might have, for the sole purpose of promulgating the truth and enforcing it upon our fellow-citizens: if we could force upon them the conviction that what we were saying was said with a full knowledge that it ostracised us politically, they would be compelled ultimately to see that our only motive in telling the truth about our government and our demagogues was to preserve our government, and they would finally believe that we who told unpalatable truths were their friends rather than the demagogues who told them lies, inflamed their passions in the pursuit of their own ambitious dreams, and sought to lead them to their own destruction and the downfall of their government.





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